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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1089

BATES BLOCK ET AL., *Petitioners,*

vs.

COMPAGNIE NATIONALE AIR FRANCE, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 8, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
TREATY INVOLVED	2
STATEMENT	2
SUMMARY OF ARGUMENT	9
ARGUMENT	9
1. There Is No Conflict Of Decisions	11
2. No Critical Questions Of Treaty Interpretation Are Posed	16
3. There Is No Error In The Ruling By The Court Of Appeals Upon The "Legislative History" Tendered By The Plaintiffs	28
A. The fact that experts may have continued to study problems related to the hiring of aircraft does not show that charters are not within the contemplation of Warsaw	29
B. The "Brazilian Proposal" was thoroughly considered by the Court of Appeals	30
C. The IATA Questionnaire and the answers thereto support the applicability of Warsaw to the present case	32
D. Cogliolo's conclusions are compatible with those of everyone except plaintiffs	35
E. The "six efforts" to "draft a new convention" do not detract from the vitality of the Warsaw Convention	36

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 386 F.2d 323. The opinion of the United States District Court for the Northern District of Georgia is reported at 229 F. Supp. 801.

JURISDICTION

The Petition for Certiorari (p. 2) adequately sets forth the jurisdictional requisites.

QUESTION PRESENTED

"The [United States District] court [for the Northern District of Georgia] correctly limited the issue:

> 'there are various possible arrangements by which a charter flight might be made, and the question therefore is not "Does the Warsaw Convention apply generally to charter flights," but the question is, "Does the Warsaw Convention apply to this particular charter flight?" ' "

Block v. Compagnie Nationale Air France, 386 F.2d 323, 326 (5th Cir. 1967) (Appendix C to Petition, p. 61a, hereinafter referred to as "App. C").

TREATY INVOLVED

The Warsaw Convention, which is involved herein, is set forth in Appendix A to the Petition for Certiorari.

STATEMENT

These suits result from an accident involving an Air France Boeing 707 aircraft at Orly Airport, Paris, France, June 3, 1962. Petitioners (plaintiffs and appellants in the Courts below; hereinafter sometimes referred to as "plaintiffs") brought suit in respect to 62 of the passengers[1] against respondent (defendant and appellee below; hereinafter sometimes referred to as "defendant"). In addition to denying that the accident was due to its negligence, respondent set forth three defenses to the actions, asserting that the dispute as to its liability is controlled by: (1) the Warsaw Convention, which applies by its terms "to all inter-

[1] Claims respecting 60 of the 122 passengers were promptly settled in 1962, without litigation, at Warsaw Convention limits of $8,300.00 for each death, plus $829.00 for each loss of property.

national transportation" (Art. 1 (1)), (2) applicable French law, which incorporates the Warsaw Convention into the domestic law of France, and (3) the contracts of carriage, which expressly incorporated, by reference, the Warsaw Convention. The District Court upheld all of respondent's defenses against petitioner's motion to strike and motion for partial summary judgment, finding that, on its face, the Warsaw Convention applied to the relationship here involved between the carrier, Air France, and its passengers, petitioners' decedents.

Article 1 (1), (2) of the Warsaw Convention clearly states the scope and defines the coverage of the treaty:

> "Scope.
>
> "(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.
>
> "Definitions.
>
> "(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Trans-

> portation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention."

49 U.S. Stat. at L. at 3014, App. A to Petition for Certiorari, pp. 2a-3a.

Articles 17 and 18 of the treaty create in favor of passengers and shippers a presumption of liability on the part of the carrier in event of injury to the passenger or damage to goods transported.

Article 22 of the treaty provides, in pertinent part, that in the "transportation of passengers the liability of the *carrier* for each passenger shall be limited" [emphasis supplied] to approximately $8,300.00,[2] and the liability "of the carrier" for loss or damage to baggage is also limited. In either instance, a higher limit may be agreed upon between the "carrier and the passenger." (For Article 22 to apply, the passenger must have been furnished a ticket and baggage check in prescribed form (Articles 3 and 4).) In the words of the Court of Appeals, 386 F.2d at 328, App. C, p. 65a:

> "The district judge found Article 1 so clear that he concluded, '[T]he language contained in the Warsaw Convention is not ambiguous, and [the court] deems it unnecessary to resort to a discussion of the legislative history of the Treaty." [Brackets in original.]

[2] Under arrangements made in 1966, the current limit is $75,000.00. See 386 F.2d at 325 n.1, App. C, p. 59a. Where plaintiffs show injury resulted from the carrier's wilful misconduct, there is no limitation on recovery (Article 25).

Pursuant to 28 U.S.C. §1292 (b), petitioners were allowed an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit on the issue of Warsaw Convention coverage. That court affirmed the District Court.[3] It agreed with the Trial Court that "on its face, the Warsaw Convention seems to cover all international carriage by air, without any limitation whatsoever." 386 F.2d at 327, App. C, p. 64a. In an exhaustive opinion, described by one panelist as a "most persuasive" and "scholarly magnum opus," the Court also considered in meticulous detail (29 reported pages, 69 mimeographed) the history of the Warsaw Convention (including every argument advanced by plaintiffs here, in the Court of Appeals, and in the District Court) and concluded that

> "The Warsaw Convention applies to the international transportation of passengers under a contract of carriage on a 'voyage' charter flight."

386 F.2d at 326, App. C, p. 61a. The Court stated, 386 F.2d at 353, App. C, pp. 115a-16a:

> "We base our holding on the facts this case presents, the text of the Warsaw Convention, and the extrinsic aids to which we turned in our quest for the true meaning of the Treaty. The Warsaw Convention is based on the existence of a contract of carriage between the air carrier and the passenger. When a passenger is transported a contract of carriage exists whether or not the transportation is undertaken pursuant to an air charter. It exists regardless of the contractual relationships between the owner and the charterer and between the charterer and the passenger. Here Air France

[3] The Court of Appeals ruled only on the applicability of the Warsaw Convention, stating, "we find it unnecessary to pass upon Air France's other defenses." 386 F.2d at 326, App. C, p. 61a.

> was the carrier. Air France assumed full contractual responsibility for the transportation of the passengers. In recognition of that responsibility, Air France controlled the aircraft and operated it through an Air France crew. A passenger's right to be carried came into being only on the issuance and delivery of an individual ticket by Air France showing on its face the airline's obligation to perform the contract of transportation under the provisions of the Warsaw Convention. We hold therefore that the Convention applied to the transaction of the passengers in accordance with the charter flight agreement between Air France and the Atlanta Art Association."

In other words, the Court of Appeals held that, upon the facts of this case, the Warsaw Convention applies (1) *ex facie,* and (2) as a matter of historical intent.

Petitioners did not ask rehearing in the Court of Appeals, but have sought certiorari from this Court.

It is desirable at the outset to see just what is undisputed on the one hand, and where the focus of controversy is centered on the other.

The transportation involved was "international transportation" as defined by Article 1 (2) of the Convention. Proper tickets and baggage checks were delivered to the passengers well in advance of commencement of the flight.[4] The carrier performing the transportation was respondent Air France. Those facts are undisputed. The Warsaw Convention was designed to apply to just such a situation: "international transportation" (Atlanta-Paris-Atlanta) was in-

[4] Plaintiffs "do not contend that the decedents failed to receive proper delivery of the tickets or proper notice of the Warsaw limitation of liability." 386 F.2d at 325 n. 2, App. C, pp. 59a-60a. See also 386 F.2d at 336, 353, App. C, pp. 80a, 115a-16a.

volved (Article 1), and proper documents ("tickets" and "baggage checks") were delivered to the passengers (Articles 3 and 4). The "carrier" (respondent Air France) is therefore entitled to the Convention limitation of liability (Article 22), and the passengers to the presumption of liability (Articles 17, 18).

The only controversy raised by petitioners centers around the fact that the trip was arranged as a "voyage" charter [5] to transport members of the Atlanta Art Association to and from Europe at the reduced rates available to "affinity groups" under Civil Aeronautics Board rules. Plaintiffs claim that the Warsaw Convention does not apply to flights denominated "charter," whatever the relationship of the parties under such "charter" arrangement. That argument is a red

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[5] As the Court of Appeals said, 386 F.2d at 329, App. C, pp. 67a-68a, "air charters may be divided into basic types.[17] (1) In a 'bare-hull', 'hire', or 'lease' charter the owner (airline) merely supplies a plane, without a crew, to a charterer, who may use it where and when he pleases; the charterer furnishes the crew and pays the expenses of operating the aircraft. (2) In a 'time charter' the airline provides the charterer with an equipped plane and crew for a specific period of time to use as the charterer wishes. (3) In a 'voyage charter' the owner charters his fully equipped plane and crew for a predetermined voyage. In a voyage charter, such as that entered into by Air France and the Atlanta Art Association, the owner controls and operates the aircraft. In effect, the middleman is eliminated, except for purposes of negotiating the charter. Although there are these three basic types of air charters, somewhat analogous to maritime charters, the degrees of control, discretion, and responsibility of the charterer can vary enormously from case to case, . . ."

"[17] The three categories of charter are widely recognized, Grönfors, Air Charter and the Warsaw Convention 15-16 (Martinus Nijhoff, The Hague 1956); Drion, Limitation of Liabilities in International Air Law (The Hague 1954); Sundberg."

herring: where there is a contract for international air transportation—a "marriage" between the carrier and the passenger, certified by a ticket delivered to each passenger (three weeks in advance of departure from Atlanta in the present case)—it matters not at all who played the role of marriage broker to bring the partners together. Whether it be a travel agent, or an affinity group, such as a local Garden Club or Art Association, or whether they entered the relationship directly without an agent, it is the relationship between the carrier and the passenger that makes applicable the Warsaw Convention:

> "The common denominator of all Warsaw contracts of carriage is the consent of the carrier to transport the passenger (or goods) and the consent of the passenger (or shipper) that the transport take place."

386 F.2d at 334, App. C, p. 76a.

The characterization of the trip as a "charter" trip is both functionally and conceptually irrelevant. The Court of Appeals recognized the true issue under the Warsaw Convention, 386 F.2d at 348, App. C, p. 105a:

> "The question courts must decide, within the context of each case, is: Who is the carrier?"

Plaintiffs have contended that, even though Warsaw is clear and unambiguous,[6] they are entitled to go to history and try to show that it *is* ambiguous and does not mean what it clearly says. Defendant does not fear

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[6] See statements by Mr. Kreindler at oral argument in the District Court, defendant's Exhibit L-1, pp. 4,8: "We don't argue it is ambiguous"; "We say to start with there is no ambiguity, . . . we say to start with we do not think the language of the Convention is ambiguous."

the history of the Warsaw Convention. On the contrary, as the Court of Appeals pointed out *in extenso*, the history of the Convention shows, and writers on the subject have universally asknowledged, that "carriers" performing voyage charters in international air transportation are covered by the Warsaw Convention. Petitioners' argument that the Warsaw Convention does not include charter flights (petition, p. 4) is misleading, confusing, and untenable.

SUMMARY OF ARGUMENT

There is no conflict of decisions. All other courts that have considered the issue here involved have decided it in complete harmony with the courts below. All legal scholars are in similar accord.

The case below was correctly limited to its own facts. It involves no broad legal principles of general public interest requiring certiorari.

ARGUMENT

The petition presents nothing warranting this Court's consideration. The issue is narrow: "does the Warsaw Convention apply to this particular charter flight?"

In fact, it may respectfully be asserted that there is no issue at all. Plaintiffs have contrived a peripheral issue out of the word "charter," whereas the perceptive analysis of the Court of Appeals demonstrates that the only real question is "who is the carrier?"[7] As Air

[7] In this connection, as we suggest below, pp. 15-16, the Court of Appeals may have under-appreciated the relevance of the discussion by the Second Circuit Court of Appeals in *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965) of that question—"who is the carrier?"

France unquestionably was the carrier,[8] the Warsaw Convention must apply to the factual situation before the Court.

This case arises out of the contract of carriage[9] — the undertaking by Air France to carry the passengers from Atlanta to Paris and return, and the consent of the passengers to be so transported, see 386 F.2d at 330-31, 332, 333-35, 336, App. C, pp. 69a-71a, 73a, 75a-79a, 80a. It presents no questions concerning a contract of hire, *i.e.*, a contract between an aircraft owner and someone "hiring" that aircraft, see *e.g.*, 386 F.2d at 329-30, 340-41, 341-48, App. C, pp. 67a-68a, 89a-91a, 92a-105a.

Warsaw covers the relationships created by the contract of carriage. The fact that there may be some unresolved questions arising out of contracts of hire in respect to *some* aspects of *some* charter relationships (not those before this Court) is of no consequence, for such questions are not presented by this case. Nevertheless, the "issue" as stated by plaintiffs—"Does the Warsaw Convention cover charter relationships?" — would include numerous such questions of no relevance here. For example, such a broadly stated "issue" attempts to raise the question whether the Convention governs the liability of the charterer (the Atlanta Art Association) to the

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[8] Air France surely was "the carrier." The Atlanta Art Association was not the carrier, and it could not have been under Civil Aeronautics Board rules. Obviously, it was not the passengers and there was no one else involved. See, *e.g.*, discussion at note 36 of the Court of Appeals opinion; see also 386 F.2d at 330-31, 341, 349 (discussion of Goedhuis), App. C, pp. 70a-71a, 91a, 107a; see District Court Opinion, 229 F. Supp. at 806-07. Appendix B to Petition, pp. 43a-45a (hereinafter "App.B").

[9] The cause of action is based upon contract, not tort, theories. See 386 F.2d at 330-31, App. C, pp. 70a-71a.

plaintiffs. Obviously, that question is not involved here. "The judicial power does not extend to the determination of abstract questions." *Ashwander v. TVA,* 297 U.S. 288, 324 (1936).

This case was decided by the Courts below upon its own facts, not upon the fanciful "issues" tendered by plaintiffs.

The decisions of the courts below were correct.

Thus, without suggesting that this case is not important to the litigants, we do respectfully urge that it lacks public importance in the sense of this Court's Rule 19.

I. THERE IS NO CONFLICT OF DECISIONS.

Petitioners' statement (petition, p. 8) that this is a case of "first impression" is lacking in candor.

The District Court [10] and the Court of Appeals [11] discussed in detail both *Flying Tiger Line v. United States,* 170 F.Supp. 422 (Ct. Claims 1959) and *Mertens v. Flying Tiger Lines,* 35 F.R.D. 196 (S.D. N.Y. 1963), *aff'd,* 341 F.2d 851 (2d Cir.), *cert. denied,* 382 U.S. 816, *rehearing denied,* 382 U.S. 933 (1965), each of which applied the Warsaw Convention to voyage charter flights. The Court of Appeals, moreover, discussed other cases holding similarly, including *Warren v. Flying Tiger Line, Inc.,* 234 F.Supp. 223 (S.D. Calif. 1964), *rev'd on other grounds,* 352 F.2d 494 (9th Cir. 1965), and the French cases of *Air-Algérie v. Fuller Frères,* Cour de Cassation (Ch. Civile Sec. Com. 1956) (Defendant's Exhibit G-1) and *Trésor Public v. Cie. Aigle Azur,* Tribunal de Grande Instance de

[10] 229 F. Supp. at 806, App. B, pp. 42a-43a.

[11] 386 F.2d at 351-52, App. C, pp. 111a-115a.

la Seine (1 Ch. 3 Sect. 1960) (Defendant's Exhibit G-2). See 386 F.2d at 352-53, App. C, pp. 113a-15a. In addition, entirely harmonious decisions have been reported in *Demanes v. Flying Tiger Line, Inc.*, — F. Supp.—, 10 Avi. Cas. 17,611 (N.D. Calif., 1967), and in *Glassman v. Flying Tiger Line, Inc.*, 9 Avi. Cas. 18,295 (N.D. Calif., 1966), which were companion cases to *Warren, supra.*

Not one decision from any tribunal can be found stating or even suggesting that the carrier-passenger relationship involved in an international voyage charter flight is beyond the compass of the Warsaw Convention. Every Warsaw Conference participant who has considered the problem has concluded that the Convention applies to voyage charter flights such as the one involved here. The same conclusion has been reached by every recognized international aviation lawyer who has treated the subject.[12]

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[12] Indeed, Chief counsel for the petitioners has openly opposed the position he now espouses in this case. *E.g.*, "Any ticket showing that the place of departure and the place of destination are in countries adhering to the Warsaw Convention, would conclusively establish that the Convention applies to all passage indicated on that ticket." 1 KREINDLER, AVIATION ACCIDENT LAW §11.05[1], at 361-62 (1963). No exception to the general applicability of that statement was made by the author, who, prefacing his treatise in February 1963 (some eight months after the accident here involved, and after many of the lawsuits in this case had been filed), declared that his work was "designed to be a comprehensive presentation, and if a particular matter isn't in here, it is because it is too unimportant to mention." Kreindler, *op. cit. supra*, at vi. Mr. Kreindler re-emphasized that statement at page 175 of the transcript of the September 16, 1963 oral argument in the District Court:

> "Now, in my book I said the ticket is conclusive as to the applicability of the Warsaw Convention, *and it is.* The ticket is conclusive of the intent of the parties in *bringing themselves under the Warsaw Convention in having international travel.*" [Emphasis supplied.]

Plaintiffs addressed to the lower court some pronouncements recognizing that some aspects of some charter relationships might not be covered by the Warsaw Convention—the rights and liabilities arising out of the "contract of hire" (charterer-owner [Art Association-Air France], charterer-third party [Art Association-property owners injured on the ground near Orly] relationships, for instance)—because those matters are not of the essence of "international air transportation," which is the concern of Warsaw. However, with complete unanimity, the experts agree that a situation such as is presented here *is* covered by the Convention because the carrier-passenger relationship involves "international air transportation," the subject matter of Warsaw. The Court of Appeals stated:

> "The applicability of the Convention. . . . is based on a contract of carriage that arises from the relationship between a 'carrier' and the passengers.[20]

"[20] Lureau, La Responsabilité du Transporteur Aérien 84 (Paris 1961); Calkins, The Cause of Action Under the Warsaw Convention, 26 J. Air L. & Com. 217, 219-20 (1959); Riese and Lacour, Précis de Droit Aérien 233 (Paris 1951); Goedhuis, National Airlegislations and the Warsaw Convention 133 (The Hague 1937); Sullivan, The Codification of Air Carrier Liability by International Convention, 7 J. Air L. & Com. 1-2 (1936); Coquoz, supra note 16, at 68, 99."

386 F.2d at 330, App. C, p. 70a. Mr. Calkins, United States delegate to the Hague Conference, is quoted to the same effect by the Court, 386 F.2d at 347, App. C, pp. 103a-04a:

> "'Mr. Calkins (United States) said that there was no necessity for inserting additional provisions in the Convention for dealing with the various types of charter arrangements. The Warsaw Convention had been designed to deal with the *relation-*

> *ships between the parties to the contract of carriage* and, the Convention should not be extended beyond this. *** As to cases falling within the generally accepted definition of a charter, he believed that the Convention now adequately regulated the relationships between the parties to contracts of carriage and if there were charter contracts which did not fall within the definition of a contract of carriage, they should be left outside the Convention.' (Emphasis added.) SJX 14, ICAO Doc. 7686/LC/140, vol. 1, p. 234."

See also the Court's quotation of Mr. Calkins' views at note 21. DeVos, who had been Rapporteur of the Conference and who was identified by the Court of Appeals as "the primary author of the Convention," 386 F.2d at 342, App. C, p. 93a, had earlier put the matter succinctly, 386 F.2d at 343, App. C, pp. 95a-96a[18]:

> " 'Conclusion: Side by side with the rules established by the Warsaw Convention on the carrier's liability, there exists a matter connected with the contract of transportation concerning the relations between owners, charterers, lessees, et cetera, which can and should, to my mind, constitute the subject of a thorough examination on the part of the C.I.T.E.J.A.' (Emphasis added.) [51] " [Footnote 51 omitted.]

See also 386 F.2d at 330-36, 339-40, 341-43, 344, 345-48, App. C, pp. 70a-80a, 87a-89a, 92a-96a, 97a, 98a-105a. Plaintiffs are confusing two different concepts, and their insistence upon arguing from extraneous matters

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[18] The word "charterers" in the quotation is the word used by DeVos, and is correctly so reproduced in the official report. The word "charters" is incorrectly substituted in Appendix C to the petition. See note 28 below.

relating to a "hiring" contract that Warsaw does not "apply to charters" merely perpetuates the confusion[14] criticized by DeVos — the confusion between "two different contracts, the one between the carrier and the passenger and the other between the owner and the operator (charterer)," the first of which DeVos had no doubt was covered by Warsaw, and "the second [of which] should be examined, if at all, in a separate convention." 386 F.2d at 344, App. C, p. 97a.

The *Mertens* case, *supra,* is very much in point. There the United States government and the Flying Tiger Line had entered into a charter agreement by which Flying Tiger would transport military personnel on Flying Tiger aircraft from the United States to Japan. The plane crashed, killing all on board. Plaintiffs sued to recover for the wrongful death of their son, an Army officer, who was a passenger on the flight. The Second Circuit Court of Appeals held:

> "We are of the opinion however that the transportation was performed by the Flying Tiger

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[14] For instance, at page 16 n.13 of their petition, the plaintiffs quote Coquoz: "the Convention authors did not intend to regulate chartering," apparently to imply that Coquoz said that charter flights are not governed by Warsaw. The quoted statement does not support the inference petitioners would have their readers draw. The Convention authors *did* intend to regulate "international air transportation" and the Court of Appeals quoted Coquoz on the issue at hand:

> " 'If the chartered aircraft serves for the transportation of the person [essentially the Air France-Atlanta charter flight] or of the goods of the charterer himself, we are confronted with an air transportation to which the Warsaw Convention undoubtedly applies.' "

323 F.2d at 349-50, App. C, p. 109a [Bracketed material by the Court.]

> Line, the owner and operator of the aircraft, and that it was performed *for* the United States, not *by* the United States. . . .
>
> "The unavoidable conclusion is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit."

341 F.2d at 853, 854. [Emphasis in original.] The Second Circuit focused upon the right question, the identity of the carrier, Was it the government (the charterer), or the airline company owning and operating the aircraft? Upon finding that Flying Tiger was the carrier, it arrived at the "unavoidable conclusion" that the carrier-passenger relationship was governed by Warsaw. As noted above, the Court below cogently observed that the question "who is the carrier" is the crucial inquiry, 386 F.2d at 348, 351, App. C, pp. 105a, 111a. Under the holding in *Mertens,* Air France is the "carrier" in the present case and the carrier-passenger relationship here involved is covered by Warsaw.

There are no opinions contradictory of those below and there is no conflict of decisions for this Court to resolve.

2. NO CRITICAL QUESTIONS OF TREATY INTERPRETATION ARE POSED.

At the outset it is to be noted that the District Court held the Warsaw Convention applicable on its face. The Court of Appeals reached the same conclusion.

Nevertheless, plaintiffs insisted that regardless of the plain meaning of the treaty, inquiry should be made into its historical background and all surrounding contemporaneous and subsequent circumstances to determine its intent. In accordance with plaintiffs' wishes, the Court of Appeals conducted an exhaustive

inquiry into the history of the treaty, applying the tests urged upon it by the appellants. (Compare Brief of Appellants below at pp. 125-34 with 386 F.2d at 336-38, App. C at pp. 81a-83a.) Now, as petitioners, plaintiffs complain of the results of that inquiry, which led the Court to a conclusion different from that desired by petitioners.[15]

It is axiomatic that intent is the touchstone of legislative interpretation. There is no real dispute as to the intent of the Warsaw Convention conferees. The Court of Appeals held, 386 F.2d at 327, App. C, pp. 63a-64a:

> "The Conference achieved its two primary objectives: (1) uniform rules relating to air transportation documents (passenger ticket, baggage check, and air waybill); (2) limitation of the carrier's liability for an airplane accident. In accomplishing the second objective, the Conference recognized the need for a quid pro quo by establishing a

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[15] Defendant opposed, and opposes, plaintiff's standards of treaty interpretation. See respondent's December 22, 1964 brief in the Court of Appeals, pp. 48-52 and Appendix A thereto, pp. 1a-37a. In short, defendant's position is that no interpretation was proper, because the treaty is unambiguous, *e.g.*, *Ex Parte Collett*, 337 U.S. 55, 61 (1949), *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 83 (1932). Secondly, even if legislative history were a proper source of inquiry, *only* that legislative history called to the attention of the President and the Senate may be considered, *Arizona v. California*, 292 U.S. 341, 359-60 (1934), and, then, even if so-called "legislative history" of which the President and Senate were aware may be resorted to, that history must come from competent sources, *e.g.*, *Fogarty v. United States*, 340 U.S. 8, 13-14 (1950); *United States v. United Mine Workers*, 330 U.S. 258, 281-82 (1947); *United States v. Allen*, 179 Fed. 13, 18-19 (8th Cir. 1910), *rev'd on other grounds*, 224 U.S. 448 (1912); *State Wholesale Grocers v. Great A & P Tea Co.*, 154 F. Supp. 471, 484-85 (N.D. Ill. 1957).

presumption of the carrier's liability, thereby shifting the burden of proof from the passenger to the carrier. (Article 20.) Secretary of State Cordell Hull, in transmitting the Warsaw Convention to the United States Senate in 1934, explained:

> 'It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges. * * * The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.'[8] [Footnote 7 by the Court omitted.]

"[8] Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934)."

Clearly the intent of the Conference was to limit the liability of air carriers engaged in international air transportation.[16] In return for that limitation of liability (which limitation can be modified upward by

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[16] See, *e.g.*, DeVos, SJX 6, p. 407; and 1 KREINDLER, AVIATION ACCIDENT LAW § 11.01[2], at 342: "Its [Warsaw's] most important provision was a limitation of liability. . . ."

agreement between the passenger and the carrier), the passenger received a presumption of liability, and a set of rules of uniform applicability throughout the world —if an American passenger is injured or loses his baggage while on international air travel in Ruritania, he is not subject to the vagaries of Ruritanian law, but to a uniform set of rules.[17]

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[17] An idea of the practical difficulties solved by the "Unification of Rules" appears in the District Court's opinion in *Warren v. Flying Tiger Line, supra,* 234 F. Supp. at 229-30:

> "The Warsaw Convention eliminates many conflict of law questions which would have otherwise confronted passengers, shippers, and airlines. The Convention also placed the burden of proof on the carrier by providing that the carrier is liable for damage unless it proves that it and its agents have taken all necessary measures to avoid damage. In the absence of the Convention, the law of the United States would require a claimant in varying degrees to explain the accident and prove that the loss or damage resulted from specific negligence or wilful act of the carrier. Under the Convention, the rights of passengers, shippers, and air carriers are the same in all of the countries parties to the Convention. Without the Convention, a single flight might involve the laws of many different countries, placing upon the passenger the burden of attempting to establish a claim under the most difficult, if not impossible, circumstance. As a matter of fact, in some countries without the Convention the claimant might well find himself without any remedy whatsoever.
>
> "As pointed out in *Ross,* the aims of the Convention would be poorly served if it were held that the limitation of liability is available only where the carrier proved a consensual agreement. It seems evident that the Convention anticipated the application of the limitation of liability where the carrier complied with article 3, which, among other things, required that a ticket be delivered to the passenger with a statement on it that the transportation was subject to the rules relating to liability established by the Warsaw Convention."

See also the recent expressions by the State Department, referred to at pp. 26-27 below.

The magnitude and practical complexities of those conflicting problems have been enormously expanded, of course, in today's jet

The "legislative" intent was to make the Convention applicable to "all" international transportation, save for three express exceptions (specifically characterized by the drafters as "narrow"), none of which is pertinent here. See 386 F.2d at 328-29, App. C, pp. 65a-67a. The Court of Appeals quite properly observed that if "the Warsaw framers intended to create an exception for charter flights it is difficult to see why they did not include a specific provision in the Convention" excepting such flights. 386 F.2d at 329, App. C, p. 67a. Plaintiffs admit (petition, p. 10) that the Convention "does not mention charter." That fact supports the decisions below. Having declared in Article 1 (1) of the Convention that the Convention applies to "all international transportation," the drafters had said all that needed to be said, or that usefully could be said. Perhaps redundantly they could have added: "including but not limited to individually-ticketed, individually-waybilled, charter, inclusive tour, package vacation and other transportation," but the drafters of Warsaw were not guilty of loose writing or loose thinking. They did what they set out to do, expressing themselves with an economy of language, saying what

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age where the sonic speeds and hemispheric trips which are common-place will be succeeded shortly by supersonic speeds and global voyages outracing the sun. It is a tribute to the vision of the Warsaw Conference that the Convention retains its vitality, and commands the respect of the world 40 years after its inception. Perhaps that is because the conferees recognized at the outset that *"what engineers are building for motors, we, jurists, must do for the code."* DeVos, cited by the Court of Appeals, 386 F.2d at 339, App. C, p. 86a [emphasis in original].

needed to be said, and, where necessary, limiting the application of the Convention by specific exceptions.[18]

In finding Warsaw applicable to the transportation here involved, the Courts below simply followed the clear intent of the drafters of the Convention.

Insofar as the Court of Appeals adverted to the importance of French legal concepts in determining the meaning of the treaty, the Court was simply considering one of the factors plaintiffs said the Court should consider to ascertain that intent.[19] It thus ill-becomes the plaintiffs now to complain (petition, pp. 5, 8-9, 15-16) that the Court did what they asked it to do. The Court appropriately recognized that if *all* factors were to be considered as plaintiffs urged, those factors certainly included the facts that a majority of the conferees were civilians, that the conference was conducted in French, that the minutes were reported in French, that the treaty was drafted in French, that the terms used are the terms of the civil law system and that the

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[18] Plaintiffs argue that the courts below in holding that "all international transportation" includes "charter" transportation, have inserted a *casus omissus* into the treaty, as the word "charter" does not appear in the treaty. (Petition, p. 10). The fact is that it is the *plaintiffs* who seek to supply a *casus omissus* to the *exceptions*, suggesting a *fourth* exception, namely: "4. This Convention shall not apply to charter flights." The courts have not added anything to the declared scope of the treaty; they have simply held that "all" means "all."

[19] Plaintiffs argued to the Court of Appeals (first 5th Circuit brief, p. 126) that:

> "'Among the factors to be taken into account by way of guidance in the interpretative process are the following:
>
> '(a) The ordinary meaning of the words of the agreement and *the context in which they are used.*'" [Emphasis in original.]

United States adhered to the French language treaty. Thus, the approach of the French legal system must be considered, especially because the hope in a multination treaty like Warsaw is to achieve a "harmonizing construction of the Convention," and such "harmonizing" is mandatory in view of "the necessity for maintaining uniformity" of application through all legal systems—common-law as well as civil law.[20] See 386 F.2d at 330, App. C, pp. 68a-69a. That is a far cry from adopting the "primacy of the French system" or abandoning traditional concepts of United States law, as plaintiffs have charged in their nationalistic smokescreen.

There was no "abandonment of our own standards of treaty interpretation in favor of a French law approach," as plaintiffs charge (petition, p. 15). The Court of Appeals discussed in detail the rules by which United States courts interpret treaties, 386 F.2d at 336-38, App. C, pp. 81a-83a. Though finding it important to consider the rules of the French legal system, the Court cautioned "[t]his principle should not be carried to extremes . . ." 386 F.2d at 330, App. C, p. 69a. As noted above, the Court looked at the very history to which the plaintiffs directed it. It considered each argument presented by the plaintiffs and found that history refutes plaintiffs' contention that Warsaw did not apply to this flight.

The jingoism of petitioners' approach also shines through in their suggestion (petition, pp. 11-16) that Americans do not have to play by the same rules as the rest of the world, despite the solemn pledging of the

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[20] It goes without saying that uniformity of application requires that the same rules govern all international air transportation, whether it be individually-ticketed or charter or whatever.

public honor to the international agreement of Warsaw adhered to by nearly one hundred nations. Respondent can concede a uniqueness in the American character, but respondent insists that Americans, perhaps pre-eminently, recognize their world-wide responsibilities. However much others may misunderstand, question, or oppose the judgments of the United States in international affairs, history does not support petitioner's contention that it is part of the American character and credo to welsh on international agreements.[21]

The Supremacy Clause of the Federal Constitution, Art. VI, Cl. 2, makes it clear that there is no "public policy" superior to treaties of the United States. The Georgia Constitution, Art. XII, Sec. I, Para. I, Ga. Code Ann. § 2-8001, similarly declares that: "The laws of general operation in this State are, first: As the Supreme Law: The Constitution of the United States, the laws of the United States in pursuance thereof and all treaties made under the authority of the United States." Georgia Courts recognize that a "treaty is the supreme law of the land." *Howell* v. *Fountain,* 3 Ga. 176, 179 (1847). (Since 1847, no liti-

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[21] See petitioners' astounding (and unsupported) statement (petition, p. 12) that "in private right treaties, the integrity and good faith of the national government are not involved. . . ."

There is no support for plaintiffs' claim (petition, p. 12) that a distinction may be drawn between "public" and "private" treaties. The Constitution declares "treaties" to be the Supreme Law of the land. The case of *Haver v. Yaker,* 76 U.S. (9 Wall.) 32 (1870) does not draw the distinction plaintiffs claim for it. Plaintiffs' quotation from that case (petition, p. 12 n.10), shows only that, as a matter of the law of nations, a treaty is binding upon the United States as of the moment the Executive signs it, although as a matter of domestic law, the treaty is binding only upon ratification.

gants in Georgia have, until now, challenged that principle, so far as respondent can determine from the reported cases.)

Considerations of "policy" are thus irrelevant. Moreover, plaintiffs' arguments as to the applicable "policy" are erroneous.

Petitioners' contention that the limitations on liability contained in the Warsaw Convention offend American public policy[22] (petition, p. 13) is plainly unfounded.

The Warsaw treaty, made by the President of the United States and concurred in by the Senate *is, ipso facto, the* public policy of the United States.

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[22] Internal United States policy is by no means susceptible of the generalized treatment given it by petitioners. Several American states have limitations on recovery for any wrongful death *without* any presumption of liability, while others have no such limitation. Maritime laws also recognize limitations upon liability. Further, respondent believes that every State has workmen's compensation laws in which a presumption of liability is exchanged for a limitation upon amount of recovery.

Warsaw of course is of the workmen's compensation *genre*—it trades a presumption of liability and a uniform set of rules for a limitation of liability. Petitioners have not identified *any* jurisdiction where that kind of exchange is contrary to public policy, and respondent has found none.

Pursuing the workmen's compensation concept a bit further, we presume that no one would argue that the workmen's compensation law did not apply in the case of an employee hired through an employment agency or through a union hiring hall, and applied only to those employees who negotiated directly with their employer for their jobs,—yet that is the pitch of plaintiffs' arguments here. In workmen's compensation law the test is whether there is an employer-employee relationship; in international air transportation the question is whether there is a carrier-passenger relationship. In either case an affirmative answer invokes the presumptions and the limitations.

Thus, the logical conclusion of Judge Jones' statement quoted at page 15 of the petition,

> "Where the meaning of a treaty depends upon construction, . . . the meaning adopted should be that which is consistent with a generally prevailing rule of public policy rather than one which should override it,"

is the conclusion actually reached by the Court of Appeals,—namely, that Warsaw applies to the international voyage charter trip here involved. The "prevailing rule of public policy" of the United States in "all international air transportation" is that stated by Warsaw. It is *petitioners* who seek to "override" the prevailing rule,[23] by claiming that "all international

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[23] A somewhat similar anomaly arises out of the first sentence quoted (petition, p. 14) from Judge Jones' opinion below, but his (and petitioners') error proceeds from a misreading of the *Midland Bank* case there referred to. The holding of that case is that:

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging, *rights which may be claimed under it*, the more liberal interpretation is to be preferred." *Universal Adjustment Corp. v. Midland Bank*, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407, 1422 (1933). [Emphasis supplied.]

The case simply does not support Judge Jones' statement (quoted at p. 14 of the petition) that the construction is preferred "which is least restrictive of the rights of *individuals*" ("individuals" presumably being natural persons, and excluding corporate personalities). There is a vast difference in content, both substantive and emotional, between what the case said and what the dissent said it said. In the present context the import is considerably altered, for it is respondent Air France that is claiming rights under the treaty, and is therefore entitled to the "liberal interpretation." In the very nature of things, a treaty is intended for the benefit of those claiming under it, and not for "individuals" generally. The quotation from *Midland Bank* is, of course, taken from this Court's identical pronouncements in *Jordan v. Tashiro*, 278 U.S. 123, 128 (1928); *Asakura v. Seattle*, 265 U.S. 332, 342

transportation" means "some international transportation."

The Department of State has only recently reaffirmed the importance of Warsaw to the national interests of the United States, describing the Convention as

> "one of the principal multilateral agreements applicable to international air transportation. It . . . creates a uniform body of law with regard to the rights and responsibilities of passengers, shippers, and air carriers in international transportation."

Department of State, United States Government Action Concerning the Warsaw Convention (May 5, 1966), reprinted in 32 J. Air L. & Com. 243 (1966). Additionally, in a hearing before the Senate Foreign Relations Committee concerning the Hague Protocol, Leonard Meeker, Legal Adviser—Designate of the Department of State, said:

> "On the whole, the Department of State believes the Warsaw Convention has been beneficial to air transport and air travelers. If we had no convention, many victims of air disasters would have

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(1924); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902); and cases cited in those precedents. Each of those cases also enunciates the rule that treaties are to be construed "liberally" to achieve the intentions of the parties to the treaty,—in the case of Warsaw, to limit the carriers' liability in return for an assured set of benefits. Respondent is unable to find, nor have petitioners cited, a Supreme Court or other case declaring the rule to be different for so-called "private rights" treaties. The statement by the British Columbia Supreme Court referred to at page 14 of the petition is dictum, for the Court ruled: "There is, however, no occasion to depart from the plain meaning of the words used in the [Warsaw] Statute." *Stratton v. Trans Canada Air Lines*, 7 Avi. Cas. 17,724, 17,725 (Br. Col. S. Ct. 1961).

> great difficulty in pursuing effective remedies and securing prompt recoveries in the case of accidents occurring over the high seas or in foreign countries with laws different from our own."

Hearings Before The Committee on Foreign Relations, Executive H., U. S. Senate, 86th Congress, 1st Sess., p. 2 (May 26, 1965). (And of course, Mr. Calkins of the United States had declared that Warsaw applies to charter flights, see pp. 13-14 above, thus enunciating that the United States' policy as to *charter* flights is *Warsaw*.)

Those declarations by the Executive Department of the United States government charged with administering the foreign relations of the country afford contemporaneous "political" support for the result reached by the Court of Appeals, giving effect, as it did, to the intention of the framers of the Convention, and to the reasonable expectations of the adherents to it. They also show that this is no time to tamper with the Treaty.

In light of petitioners' astonishing view of the (lack of) sanctity of treaties touching "private rights," the Court might understandably feel that perhaps it should clarify the status of such treaties. However, that is not necessary, for it clearly appears from this Court's recent decision in *Zschernig* v. *Miller*, — U.S. —, 88 S.Ct. 664 (1968) that treaties affecting "private rights" (and what treaty does not, directly or indirectly, do so?) are not, as claimed by petitioners, second- (or lower-) class treaties worthy of no respect beyond that dictated by the transitory self-interest of the day. In *Zschernig* v. *Miller, supra*, this Court upheld a 1923 treaty with Germany, reaching a result that must surely have been as unpalatable to this Court

as it was to the State court whose decision was reversed, in that under the treaty, the East German next of kin of an Oregon intestate (and presumably in practical effect, the East German Government) was allowed to inherit in contravention of Oregon's public policy, plainly expressed by positive statutory and decisional law. In the concurring opinion, it was pointed out that nearly 200 years of national honor (actually antedating the Confederation) was wrapped up in this Country's agreements with other nations of the world regarding the right of individuals to inherit property.

When the United States gives its word to the nations of the world, it honors its commitments. The decision of the Court of Appeals here is in complete harmony with that principle.

The lower Courts' decisions that Warsaw is applicable are completely consistent with this Court's decisions, with this Country's National honor, and call for no remedial action by this Court.

3. THERE IS NO ERROR IN THE RULING BY THE COURT OF APPEALS UPON THE "LEGISLATIVE HISTORY" TENDERED BY THE PLAINTIFFS.

The same "wealth of historical data" promised by plaintiffs to this Court (petition, p. 17) was presented to the Court below and carefully considered by it. Plaintiffs do not deny this—they simply say (*id.*) that the "court below was wrong in its conclusion" drawn therefrom. If the Court of Appeals erred, that Court should have been afforded the opportunity to correct its error by the timely filing of a motion for rehearing. This Court, of course, does not exercise its certiorari jurisdiction "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co.* v. *Coty,* 262 U.S. 159, 163 (1923). It is the office of

the motion for rehearing in the Court of Appeals to correct errors made by that Court. No such motion was filed, perhaps because plaintiffs realized the Court below had carefully considered all the arguments plaintiffs had addressed to that Court,[24] and now attempt to rehearse in this Court.

A. The Fact That Experts May Have Continued To Study Problems Related to the Hiring of Aircraft Does Not Show That Charters Are Not Within the Contemplation of Warsaw.

The Court below considered in detail every mention of charter and Warsaw made before, during and after the Conference, 386 F.2d at 326-27, 329-52, App. C, pp. 62a-115a. The experts have always agreed that Warsaw governs the carriers' liability to the passengers arising out of the contract of carriage; less clear, perhaps, are the relations (not at issue here) "between owners, charterers, lessees, et cetera," 386 F.2d at 343, App. C, p. 96a. It was to this (here irrelevant) *second* category of relations that the experts addressed their efforts subsequent to the 1929 Conference, the question of the liability of carriers to passengers having been resolved by the Warsaw Convention. The distinction

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[24] Fifth Circuit Court Rules 25(a) and 29 contemplate both rehearing and rehearing *en banc*. As plaintiffs seemingly take comfort in the fact that there was a dissent in the Court of Appeals (petition, pp. 5-6, 8, 14-15, 17, 31), it is particularly significant that no rehearing was sought. It should be observed that the existence of a dissent below is of less than usual value. Dissenting Judge Jones starts from the premise of opposition to limitations upon liability; then he finds that inasmuch as the Convention did not name charter flights, the treaty is susceptible to interpretation, and he therefore interprets it in accordance with his views. 386 F.2d at 353-54, App. C at 116a-18a. (We have, at p. 25 n. 23, above, shown certain errors in the dissent.) Nowhere does the dissent take issue with the historical exegesis of the majority; to the contrary, the dissent terms it a "magnum opus" that is "most persuasive." 386 F.2d at 354, App. C, p. 118a.

is clearly drawn, and plaintiffs are simply seeking to confuse the issue.

For plaintiffs to claim (petition, pp. 17-18) that the continued work on the unresolved aspects of the *hiring* (leasing) concept shows that charter was not there in 1929 is like claiming that if respondent continually inspects, maintains, repairs, overhauls and retrofits its aircraft to improve their performance, it must be assumed that the airplane does not exist.

B. The "Brazilian Proposal" was Thoroughly Considered by the Court of Appeals.

Plaintiffs now persist in a subtle transition, which they unsuccessfully attempted in the Court below,—one that changes considerably the meaning of the so-called "Brazilian proposal." At page 19 of their petition, plaintiffs claim that "[t]o cover *charters* . . . the Brazilians suggested a clause defining the word 'carrier' to include both owner and charterer in a charter situation," and (*id.* at 21) they claim that "Ambrosini, Coquoz and Drion, . . . all agreed that the purpose of the Brazilian proposal was to include charters within the Warsaw Convention." [25] [Emphasis supplied.]

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[25] We have shown at p. 15 n. 14, above, that Coquoz stated that a flight of the sort here involved is covered by Warsaw, a point also made by the Court below, 386 F.2d at 349-50, App. C, p. 109a-10a. Similarly, both Drion and Ambrosini declared that a voyage charter trip of the sort here involved is within the scope of Warsaw. 386 F.2d at 348 (Ambrosini: "if a contract called by the parties 'charter' is not in essence more than simple transportation then *it does* fall under the rules of the Warsaw Convention; . . ." [emphasis in original]), 348-49 (Drion: "A voyage charter, however, by which one person assumes the obligation to carry with his aircraft and crew, from one point to another, certain persons or goods agreed upon or to be indicated by the charterer, would be a contract of carriage governed by the Convention. . . ."), App. C, pp. 106a, 107a. See also Defendant's Exhibit R.

The plaintiffs subtly have substituted "charters" for "charterers," a deception that did not confuse the Court below, which found that the "Brazilian proposal" to define "carrier"[26] simply "recognizes . . . that in some circumstances a problem will exist as to *who is the carrier for Warsaw purposes.*" 386 F.2d at 341, App. C, p. 90a [emphasis in original]. The Court accordingly did "not agree" with plaintiffs' claim that rejection of the Brazilian proposal served to reject any connection between the Convention and Charter flights. *Id.*

But what if the so-called "Brazilian proposal" had been adopted? The word "carrier", wherever it appears in the Convention, would then be defined as "owner, charterer or pilot." What effect would that have had? For one thing, under the terms of the Convention, charterers (and pilots) would be subject to the presumption of liability of Article 17 ("The car-

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[26] According to the Court of Appeals, the "Brazilian Proposal" would have defined "carrier" in the following terms:

> "The carrier shall be considered the person who owns, charters or manages an aircraft, uses it individually or jointly in the transportation of persons and goods, within the meaning of this convention, and in conformity with national regulation." [Court's footnote 43 omitted.]

386 F.2d at 340, App. C, p. 89a. The original proposal, sent to the preparatory commission, and reported out as quoted above, actually referred to the "owner, *lessee,* or pilot" (SJX6, p. 470). Giannini, Chairman of that commission, misread the original "Propriétaire, *locataire,* ou conducteur" (SJX6, French version, p. 187) as "propriétaire, *affréteur,* ou conducteur" (SJX6, French version, p. 97)—"owner, *charterer* or pilot" (SJX4). Thus the "Brazilian proposal" referred to by plaintiffs is actually Giannini's mis-statement of that proposal. The Convention delegates had before them the text of the Brazilian proposal in its correct form as Giannini made his report. The delegates were therefore aware of the true nature of the proposal (SJX6, p. 16).

rier [charterer, pilot] shall be liable . . . .''), and the limitation of liability of Article 22 (''. . . the liability of the carrier [charterer, pilot] shall be limited . . . .'').

But the Giannini statement of the Brazilian proposal was not adopted. What effect does that have? The charterer (here, the Atlanta Art Association) is not a ''carrier'' within the meaning of the Warsaw Convention. But, does the non-passage of the Giannini-Brazilian proposal remove from the *carrier* (Air France) the applicability of the Convention? Certainly not. The fact that Warsaw may not apply to charterers (and ''manufacturers, maintenance companies, airport operators, dispatching companies, air traffic controllers, etc.''),[27] does not affect Air France one iota. Warsaw applies to the ''carrier''; Air France was the carrier; ergo, Warsaw applies to Air France.

It is thus of no consequence that the ''Brazilian proposal'' was not adopted. It is of some significance, however, that Article 1 (1) of the Convention was amended *after* rejection of the ''Brazilian Proposal'' by adding the word ''all'' in front of ''international transportation,'' thus emphasizing that Warsaw covers ''all international transportation,'' including any transportation forms that may have been suggested during consideration of the ''Brazilian proposal.'' 386 F.2d at 338, App. C, p. 84a.

C. The IATA Questionnaire and the Answers Thereto Support the Applicability of Warsaw to the Present Case.

Although plaintiffs emphasize (petition, pp. 24-26) the fact that Major Beaumont (and IATA) asked questions about charter in 1932, they are highly selective in their presentation of Major Beaumont's answers.

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[27] 1 KREINDLER, AVIATION ACCIDENT LAW § 11.05[7], at 368.

(A lawyer may very well know the answer when he asks the question; indeed, it is almost an inviolable rule of advocacy that he not ask the question if he doesn't know the answer.) The answers—all congruent with the result reached by the Court below—are examined in depth by the Court of Appeals, 386 F.2d at 342-44, App. C, pp. 94a-98a. They flatly contradict petitioners' assertion (petition, p. 26) that "the airlines . . . and . . . Beaumont . . . knew that the Warsaw Convention had not taken charters into consideration."

Plaintiffs fail to mention DeVos's response to the IATA Questionnaire:

> "*Whether the party who accepts the transportation is the owner or simply the charterer—for a period of time or by the trip—the situation of the passenger (transporté) or the shipper will not be changed: their rights and their obligations continue to be determined by the articles of the Warsaw Convention.*"

386 F.2d at 343, App. C, p. 95a [emphasis by the Court]. The Court of Appeals pointed out that Beaumont "saw eye to eye with DeVos" on the "question before this Court," 386 F.2d at 343, App. C, p. 96a. As noted by the Court of Appeals, *id.* at n. 51, DeVos's answer was translated into English and circulated to the Department of State and the Secretary of Commerce *before* the United States adhered to the Convention. Thus, when the United States adhered to the Warsaw Convention in 1934, it knew of DeVos's views.

Plaintiffs imply (petition, p. 26, n. 39) that IATA Decision #8 (1933) casts doubt upon the authenticity of the holdings below in that "Decision #8" proposed "an international convention treating exclusively with"

"*special* charter contracts." But "Decision #8" grew out of Major Beaumont's Report to IATA, "The Convention of Warsaw and Special Charter Flights" (Defendant's Exhibit U-2) where Major Beaumont considered some practical problems of fulfilling the Convention's documentation requirements in some charter situations. However, those problems arose *because* Warsaw *was* applicable. Beaumont declared:

> "In so far as contracts of Special Charter constitute contracts for international carriage by air the provisions of the Warsaw Convention apply to such contracts." Defendant's Exhibit U-2, p. 1.

In addition, Beaumont noted that under the domestic laws of some nations, some carriers in some charter situations might be regarded as both "carrier" and "charterer," an "almost impossible" predicament, in his view. He felt that attempts by individual nations to clear up through changes in their domestic laws the uncertainties he saw would simply multiply the problems and, accordingly, he recommended a subsequent revision of the Convention to achieve uniformity. That was the import of "Decision # 8." See Defendant's Exhibit U-2; see also 386 F.2d at 343, App. C, p. 96a. As the Court of Appeals noted, 386 F.2d at 344, App. C, p. 97a, Beaumont 30 years later, by an affidavit filed in the record below (Defendant's Exhibit Q) confirmed his view that Warsaw covers the relationship involved in this case.

Respondent cannot resist inquiring how the Court below could be accused of having "overlooked" the statement of Giannini (petition, p. 26 n. 40) that the Court actually quoted *in extenso* (so as not to be mis-

leading, as is plaintiffs' truncated version) [28] and commented upon in detail and in context, 386 F.2d at 344, App. C, p. 97a:

> "Professor Giannini of Italy argued that the 'question consisted in seeing whether charter-parties should be introduced in air law . . . and *what should be the relationship between the owner and the operator.*' " [Emphasis supplied.]

Plaintiffs omitted the italicized portion, which shows what Giannini meant, and *at that,* accused the Court of "overlooking" the statement entirely!

D. Cogliolo's Conclusions Are Compatible With Those of Everyone Except Plaintiffs.

The Court of Appeals observed that the plaintiffs "emphasize certain selected statements of Cogliolo," 386 F.2d at 345, App. C, p. 99a, and plaintiffs allege that the Court of Appeals "took a very narrow and selective view of the plain import" of Cogliolo's writings (petition, p. 27).

The Court's observation is sound. The plaintiffs' charge is not. See 386 F.2d at 344-46, App. C, pp. 98a-102a, where the questions raised by Cogliolo, and his views, are fully explored by the Court.

Plaintiff's contention (petition, p. 28) that "the first five conclusions in Cogliolo's 1937 report . . . clearly demonstrate that the Warsaw Convention does not

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[28] In view of what previously has been said about plaintiffs' casual substitution of "charter" for "charterer", we observe that the quoted word "charterer" in the second full paragraph on page 26 of the petition is the word used by the Court of Appeals in the quoted sentence, 386 F.2d at 342, not "charters" as it is reproduced in Appendix C to the petition, p. 93a. See also note 13 above.

apply to charters" is groundless. It is based upon misunderstanding and confusion. It is the same confusion between the contract of hire (lease) and the contract of carriage to which respondent has already referred. Footnote 56 to the Court's opinion below sets out Cogliolo's report and all of his conclusions. He was concerned with the totality of "the rules of the contract for the hire of aircraft." Number 6 is the only one of his hypothetical situations focusing upon the contract of *carriage* providing for *international air transportation.* That situation described the relationship here involved (except that Cogliolo used cargo rather than passengers) and Cogliolo concluded that Warsaw was applicable to the carrier-patron relationship thus established. None of the other illustrations involved the incidents of liability arising out of *transportation.* Rather they were concerned with relationships and liabilities between the owner and the lessor *inter sese* (and to third parties) arising out of the "hiring" of aircraft; those supposititious cases had nothing to do with liabilities arising out of the contract of carriage, and therefore nothing to do with Warsaw. It is thus fair to say that Cogliolo concluded that Warsaw covered the relationship that arose out of the contract of carriage between Air France and the passengers on the flight in question in this case.

E. The "Six Efforts" To "Draft a New Convention" Do Not Detract From the Vitality of the Warsaw Convention.

No one has ever claimed that the Warsaw Convention covered all aspects of aircraft hire (lease) relationships. That is not the issue here as is shown by the rejection by the Courts below of the academic, abstract "issue" posed by plaintiffs' question: "does the Warsaw Convention apply to charters?"

The Warsaw Convention does apply to international air transportation, and it was properly held applicable here, because this case involves international air transportation.

If the Atlanta Art Association were a defendant, an entirely different question would be posed, but the answer of the Courts below has been properly limited to the question before them.

That subsequent attempts may have been made to deal with aspects of charter relationships, not involved here, is irrelevant. The issue is whether the admitted carrier-passenger relationship between Air France and the passengers on its aircraft in international air transportation on June 3, 1962, is governed by Warsaw.

To return to the airplane metaphor suggested above, respondent might put a new experimental distance-measuring device aboard its aircraft, without denying the reality of the standard radar or of the aircraft as a whole.

F. The Language and Structure of the Treaty Confirm the Rulings of the Courts Below.

The District Court held that the Warsaw Convention, by its plain language, applied to the transportation here involved. The Court of Appeals carefully considered the history and language of the Convention. The alleged "problem" presented by the fact that there is a "contract of hire" between the charterer and the carrier as well as the "contract of carriage" attested by the ticket between the carrier and the passenger (petition, p. 30), is illusory. 386 F.2d at 330-36, App. C, pp. 69a-80a. The carrier-passenger relationship is the same whether entered directly, or through the

agency of a go-between.[29] The Warsaw Convention applies to these suits, as the District Court and the Court of Appeals found.

G. The Record, as well as the Opinion of the Court of Appeals, is Replete with Expressions by the Experts Fully Sustaining the Decisions Below.

We reiterate that not one authority has ever stated that the Warsaw Convention is not applicable to voyage charter flights such as the one here involved. In addition to the references previously made to the statements of recognized experts, we invite the Court's attention to the similar views of other commentators, cited in the opinion of the Court of Appeals:

"The Warsaw Rules, Goedhuis states, apply to a wider extent to *voyage charter agreements*. . . . This carriage therefore comes under the convention." 386 F.2d at 349, n. 58, App. C at 108a. [Emphasis in original.] In his affidavit filed in the District Court, Defendant's Exhibit S, Goedhuis testified that "the Warsaw

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[29] That is the clear teaching of *Ross v. Pan American Airways, Inc.* 299 N.Y. 88, 85 N.E.2d 880 (1949); see opinion below, 386 F.2d at 352-53, App. C, p. 114a. See also *Egan v. Kollsman Instrument Co.*, — N.Y. —, 10 Avi. Cas. 17,651 (N.Y. Ct. App. 1967). There the New York Court of Appeals held that Warsaw governed the relationship between American Airlines and a passenger on the Chicago-New York leg of a New York-Vancouver-Chicago-New York trip where the original contract of carriage was made between Northwest Airlines and the passenger, and American accepted the passenger for the transportation specified in a ticket issued on Northwest ticket stock. The original contract of carriage was made by Northwest, and there was no "single definite contract" (*cf.*, petition, p. 30) between American and the passenger, but there was certainly a "contract of carriage" between American and the passenger; because American "consented" to transport the passenger, Warsaw was invoked. See quotation from 386 F.2d 334, App. C, p. 76a, at p. 8 above.

Convention would be applicable" to the case at hand. 386 F.2d at 349 n. 59, App. C, at 108a. Goedhuis is Professor of Air and Space Law at the University of Leyden, author of several books and articles on the Warsaw Convention and President of the Hague Conference.)

"For K. Grönfors, as for other commentators, there is no doubt that charter flights come within Warsaw." 386 F.2d at 350, App. C; pp. 110-11a. (Grönfors is the author of AIR CHARTER AND THE WARSAW CONVENTION (Stockholm 1956).)

Maniatopoulos is to the same effect: "*in the case of charter for a given journey, where the charterer will be using the aircraft exclusively for his own purposes, the Warsaw Convention has been considered as applying.* This Convention has therefore been considered as applying generally, . . ." 386 F.2d at 346, App. C, pp. 101a-02a. [Emphasis by the Court.] Maniatopoulos' views are particularly persuasive in opposition to plaintiffs' claims regarding subsequent efforts to amend Warsaw with respect to charters, for he was Rapporteur of the Third Commission, and the above-quoted language appears in his 1946 report on a proposed convention he drafted on "the hire and charter of aircraft". 386 F.2d at 346, App. C, p. 101a.

See also the Court of Appeals' discussion of Riese, "a German delegate to Warsaw," 386 F.2d at 348, App. C, pp. 106a-07a (see also RIESE, LUFTRECHT XIV-XV, § 42(3), pp. 406-09 (Stuttgart 1949), as quoted at pp. 91-92 of the defendant's December 22, 1964 brief in the Court of Appeals). See also the Court's treatment of Sundberg, 386 F.2d at 350, App. C, pp. 109a-10a.

In addition, we respectfully refer the Court to the views expressed by Rhyne (Chas. A. Rhyne, former President of the American Bar Association, former Chairman of the ABA Committee on Aeronautical Law, and author of numerous works on aviation law) in his AVIATION ACCIDENT LAW 257-58 (1947) (referred to at pp. 93-94 of our December 22, 1964 brief below.)

CONCLUSION

There is no merit in the Petition, and nothing is presented calling for review by this Court.

WHEREFORE, Respondent prays that the petition be denied.

Respectfully submitted,

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March 8, 1968

CERTIFICATE OF SERVICE

It is hereby certified that copies of the Brief for Respondent in Opposition to Petition for Certiorari have been served upon counsel for the petitioners in the foregoing matter by depositing the same in the United States mail, with adequate postage thereon, properly addressed to:

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